SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 2 1971
E. ROBERT SEAVER, CLERK

# in the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1191

FRED H. ADLER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

## INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Question Presented for Review | 2 |
| Statutory Provision Involved | 2 |
| Statement of the Case | 3 |
| Reason for Granting the Writ | 6 |
| 1. The Decision Below Conflicts with the Decision of this Court in *U. S. v. Johnson* and the Decisions of the Majority of Circuit Courts in the United States, by Allowing the Admission of Summary Exhibits and Testimony Thereon Containing Evidence not Otherwise in the Record that was Purportedly Contained in the Books and Records of said Corporation upon which said Charts Were Allegedly Based, but not Admitted as Evidence in this Case | |
| Conclusion | 10 |
| Certificate of Service | 11 |

## INDEX (cont.)


| | Page |
|---|---|
| Appendix A — Judgment | App. 1 |
| Appendix B — Opinion Below | App. 3 |
| Appendix C — Application for Extension of Time Pursuant to Rule 22 | App. 23 |
| Appendix D — Order Extending Time to File Petition for Writ of Certiorari | App. 29 |
| Appendix E — Order Staying the Mandate | App. 31 |
| Appendix F — Excerpts from Transcript, pages 2704-2710 | App. 33 |
| Appendix G — Excerpts from Transcript, page 2713 | App. 39 |
| Appendix H — Excerpts from Transcript, pages 2722-2724 | App. 41 |

## TABLE OF CASES


| | Page |
|---|---|
| *Blackwell v. U. S.*, 244 F.2d 423, (8 Cir., 1957) | 9 |
| *Conford v. U. S.*, 336 F.2d 285, (10 Cir., 1964) | 6 |
| *Corbett v. U. S.*, 238 F.2d 557, (9 Cir., 1956) | 8 |
| *McCarthy v. U. S.*, 409 F.2d 793, (10 Cir., 1969) | 8 |
| *Oertle v. U. S.*, 370 F.2d 719, (10 Cir., 1966) | 7, 9 |
| *Smith v. U. S.*, 239 F.2d 168, (6 Cir., 1956) | 9 |
| *Somberg v. U. S.*, 71 F.2d 637, (7 Cir., 1934) | 9 |
| *U. S. v. Johnson*, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1942) | 2, 6, 7, 9 |
| *U. S. v. O'Connor*, 237 F.2d 466 (2 Cir., 1956) | 8 |

## STATUTORY PROVISIONS INVOLVED


| | Page |
|---|---|
| Title 15, United States Code, Section 77q(a) | 3 |
| Title 18, United States Code, Section 371 | 3 |
| Title 18, United States Code, Section 3341 | 3 |
| Title 28, United States Code, Section 1254(1) | 2 |

# In the Supreme Court of the United States

**OCTOBER TERM, 1970**

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**No. ————**

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FRED H. ADLER,

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UNITED STATES OF AMERICA

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, FRED H. ADLER, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on November 2, 1970.

## OPINION BELOW

The Opinion of the Court of Appeals is reported at ——F.2d—— and also appears in the Appendix B hereto.

## JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on November 2, 1970. A timely petition to extend the time for the filing of a petition for certiorari was granted by this Court on December 7, 1970, up to and including January 1, 1971, and a timely petition to stay the mandate of the Court of Appeals for the Fifth Circuit was granted on December 23, 1970, up to and including January 1, 1971, and until such time as this petition is hereinafter acted upon by this Court, all of which more fully appears in the Appendix hereto, wherein it is set out the orders of this Court and that of the Court of Appeals for the Fifth Circuit. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

## QUESTION PRESENTED FOR REVIEW

Whether or not the Court of Appeals erred in affirming a lower court's decision admitting into evidence certain charts and records which had been purportedly prepared by the witness Callahan and in admitting into evidence testimony relating to the same without placing into evidence the books and records of said corporation upon which said charts were allegedly based, as is required by the decision of this Court in *U. S. v. Johnson* and cases decided subsequent thereto.

## STATUTORY PROVISION INVOLVED

There is no pertinent statutory provision involved.

## STATEMENT OF THE CASE

This cause originated in the United States District Court, Southern District of Florida.

The Petitioner, together with seven other individuals, was charged in a Fifteen Count indictment, charging fraud in the sale of securities, 15 U.S.C., Section 77q(a), Counts One-Seven; mail fraud, 18 U.S.C., Section 3341, Counts Eight-Fourteen; and conspiracy as to each of said statutes, 18 U.S.C., Section 371, Count Fifteen. The cause came on for trial on November 14, 1966, and on December 23, 1966, the jury impanelled to hear the cause found the Petitioner, FRED H. ADLER, guilty as to Counts One, Two, Three, Four, Five, Six, Seven, Eight, Eleven, Thirteen, Fourteen and Fifteen as charged in the indictment.

After the cause had been in trial almost three weeks, the Government called to the stand an individual who had testified on numerous occasions in other securities and mail fraud cases on behalf of the Government, George M. Callahan. The witness, on direct examination, testified that he had had occasion in his official capacity to examine the books and records of four corporations and thereafter, having so testified, the Government proceeded to have identified Government's Exhibit 497 which purported to be a chart prepared by the witness which allegedly was based on the books and records of American Bonded Mortgage Company and in response to this counsel's question as to what books and records of American Bonded Mortgage Company such chart was allegedly based, stated:

"They have not all been placed into evidence. One or two of them have been placed into evidence, I believe, but the majority of them have been identified."

In addition, the witness further stated:

"THE WITNESS:

This chart was prepared from records, some of which are in evidence and some of which have been identified but are not in evidence.

"MR. PREBISH:

The bulk of the figures are from records which are in evidence or not in evidence?

"THE WITNESS:

Well, at this point I really can't recall just what records have been put into evidence and which have not.

I would — if I had to answer the question, *I would say that the bulk of the figures are from records which are not in evidence.*" (Emphasis supplied)

Subsequent to the numerous objections of all counsel that such charts were not admissible since they constituted a summary of matters not in evidence, the document was admitted into evidence (Appendix F). Thereafter, testimony was solicited from said charts, the objection to which was made by counsel and again overruled (Appendix G). At one point, the Government even had the audacity to

suggest that it was incumbent upon the defense to place these books and records into evidence if they were going to challenge Mr. Callahan's expert testimony (Appendix H).

Thereafter, the Government was allowed to place into evidence other charts prepared by Mr. Callahan which were again based on books and records which were not in evidence, the objections to which were overruled and testimony allowed thereon (Appendix H — the continuous objection noted therein and reasserted in relation to Exhibit 498, 499, 500, 501, 502, and 503, all of which were summarily overruled as stated on page 2723).

The extent of the testimony relating to the books and records was to the effect that Mr. Callahan had examined and prepared the charts from certain books and records which were held and contained in the office of John Nicholas, who was then the capital trustee of the bankrupt corporation.

No effort was ever made on the part of the Government to place into evidence these other books and records to prove the accuracy and authenticity and to lay a proper foundation for charts which were not merely testified from but which were in fact allowed in the jury room during their deliberations.

Callahan's testimony consisted of over two hundred pages and served as the culmination of weeks of testimony consisting of some sixty-nine witnesses and in fact was the only expert testimony offered by the Government in this cause.

## REASON FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *U. S. V. JOHNSON* AND THE DECISIONS OF THE MAJORITY OF CIRCUIT COURTS IN THE UNITED STATES, BY ALLOWING THE ADMISSION OF SUMMARY EXHIBITS AND TESTIMONY THEREON CONTAINING EVIDENCE NOT OTHERWISE IN THE RECORD THAT WAS PURPORTEDLY CONTAINED IN THE BOOKS AND RECORDS OF SAID CORPORATION UPON WHICH SAID CHARTS WERE ALLEGEDLY BASED, BUT NOT ADMITTED AS EVIDENCE IN THIS CASE.

It should be noted that Petitioner does not contend in any way that the use of summary exhibits and charts are repugnant to the laws of the United States. Petitioner recognizes their value in assisting a jury in understanding of long and complicated sets of facts. *Conford v. U.S.*, 336 F.2d 285, (10 Cir., 1964). However, that very value may be subverted by the improper utilization of the device of summary evidence in the form of exhibits and/or charts. This Court has set certain guidelines for the proper use of these types of exhibits in the case of *U.S. v. Johnson*, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1942). In that case, the Court set down certain standards that must be met in the use of such summary charts and/or computations so that the jury would be free to exercise its untrammelled judgment upon the worth and weight of testimony. The Court indicated that such summary calculations, computations, or charts should be based on evidence that is already in the record. The requirements

set out in the *Johnson* case were based on the rationale that the jury should not be misled "into the notion that they must accept the calculations of the Government expert . . . " as a true showing of the primary evidence that has been introduced in the case.

In the instant cause, this Petitioner respectfully contends that the trial court, and the appellate court in affirming that decision, incorrectly held that the summary evidence of charts and records was admissible in evidence while not admitting the primary books and records of subject corporation that were allegedly the source of the summary evidence. This decision of the Circuit Court of Appeals is in direct conflict with the majority of circuit courts in the nation which have uniformly held that in order for summary exhibits to be utilized and sanctioned by the courts, they must be based on evidence that has been admitted previous to the summary exhibits. In the case of *Oertle v. U.S.*, 370 F.2d 719, (10 Cir., 1966), the Court quite plainly stated this point when it said: (370 F.2d 728)

> "The use of summary exhibits in proper cases has been sanctioned by this Court *only when they reflect and summarize other evidence in the case.* When such a proposed exhibit contains evidence not otherwise in the record it loses its identity as a summary and is *not admissible.*" (Emphasis supplied)

This statement is not hard to understand inasmuch as summaries are solely used to assist juries in considering primary evidence in the form of books, records, and

testimony and are not to be used as a substitute for that primary evidence. *McCarthy v. U.S.*, 409 F.2d 793, (10 Cir., 1969). Some courts have held that this safeguard must be applied in order for any summary evidence to be presented to a jury. *Corbett v. U.S.*, 238 F.2d 557, (9 Cir., 1956).

The burden of assuring that these safeguards are met has uniformly been placed in the trial court. That court must scrutinize charts, summaries, schedules, etc. before they can be admitted into evidence, to see whether they fairly represent and *summarize the evidence on which they are based. U.S. v. O'Connor*, 237 F.2d 466, (2 Cir., 1956). Petitioner respectfully contends that it is virtually impossible for the trial court in the instant case to have met their burden of scrutiny when in fact evidence which they were required to scrutinize was not in fact admitted in the cause.

Petitioner would submit that the rationalization used by the Court of Appeals in this case has subverted the very purpose of a jury system in making the facts of the case unavailable to the triers of fact. The Court of Appeals has stated that as long as the books and records and primary evidence are available to the opposing counsel, then the admittance of the summary evidence was proper. This statement by the Court of Appeals, which seems to place a premium on a defendant being represented by a superior counsellor at law rather than putting the emphasis where it should be, on the truthfulness of the facts as impartially presented and determined by the true triers of fact, the jury.

This Court has uniformly held, as is aptly pointed out in the *Johnson* decision, supra, that the true emphasis should and in fact must be directed toward the sanctity of the jury deliberation and not toward the availability of primary evidence to the respective counsel in the cause. If this were the case, then Petitioner would contend that the very essence of the jury system is in great jeopardy.

The inherent prejudice which has resulted in the instant cause due to the admission of such summary evidence without a proper predicate being laid, is evident, in that during the course of the trial sixty-nine witnesses were called, and only one of them was a qualified expert, Mr. Callahan. His testimony and his testimony alone was the sole expert testimony brought forth by the Government and the extent of that testimony expands over two hundred pages of the trial transcript. Petitioner does not in any way challenge the qualifications of Mr. Callahan, but would submit that the true triers of fact had no method whatsoever of either verifying, or questioning his testimony inasmuch as the primary evidence that was the basis for same was not available for *their* deliberations.

In addition, neither the *Johnson* nor *Oertle* decisions, supra, are in any way isolated decisions and are in fact supported in the majority of circuits in the United States. See *Somberg v. U.S.*, 71 F.2d 637, (7 Cir., 1934); *Blackwell v. U.S.*, 244 F.2d 423, (8 Cir., 1957); *Smith v. U.S.*, 239 F.2d 168, (6 Cir., 1956). These decisions and others too numerous to cite herein are in direct conflict with the holding of the Fifth Circuit Court of Appeals in the instant case and, therefore, Petitioner respectfully requests that this Court resolve the conflict and grant the Writ of Certiorari herein sought.

## CONCLUSION

Based on the above and foregoing, the Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

Respectfully submitted,

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E. DAVID ROSEN, *Of Counsel*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing was mailed this 31 day of December, 1970, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

## APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

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**October Term, 1969**

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**No. 24583**

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D. C. Docket No. 66-67-CR

MARK H. KROLL, WILLIAM CAHN, WILLIAM CRISWELL, JACK CHERNAU, JOHN S. HUNT, ROBERT C. BROWN and FRED H. ADLER,
*Appellants,*

*versus*

UNITED STATES OF AMERICA,
*Appellee.*

**Appeal from the United States District Court for the Southern District of Florida**

Before PHILLIPS, BELL and SIMPSON, Circuit Judges.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 2, 1970

Issued As Mandate: Dec. 18, 1970

(As to John S. Hunt, Mark H. Kroll & William Criswell only)

## APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

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**No. 24583**

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MARK H. KROLL, WILLIAM CAHN, WILLIAM CRISWELL, JACK CHERNAU, JOHN S. HUNT, ROBERT C. BROWN and FRED H. ADLER,
*Appellants,*

*versus*

UNITED STATES OF AMERICA,
*Appellee.*

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**Appeals from the United States District Court for the Southern District of Florida**

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(November 2, 1970)

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Before PHILLIPS*, BELL and SIMPSON,
Circuit Judges.

SIMPSON, Circuit Judge: The appellants, Mark H. Kroll, William Cahn, William Criswell, Jack Chernau, John S. Hunt, Robert C. Brown and Fred H. Adler, are

*Honorable Orie L. Phillips of the Tenth Circuit, sitting by designation.

here seeking relief from judgments of conviction entered after jury verdict of guilty[1] in the district court. They raise a myriad[2] of grounds upon which they claim that the convictions are defective. We affirm.

The indictment charged and the jury found that the defendants had engaged in a scheme to defraud investors in the offer and sale, through American Bonded Mortgage Company, Inc. (ABM), and affiliated companies, of notes

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[1]Each of the seven appellants was convicted under seven counts of willful violation of Title 15, U.S.C. §77q(a) (use of the mails in furtherance of a scheme to defraud in the sale of securities), four counts of willful violation of Title 18, U.S.C., §1341 (use of the mails in furtherance of a scheme to defraud), and one count of violation of Title 18, U.S.C., §371 (conspiracy).

[2]At least twenty-five grounds of error are asserted by one or more appellants. This opinion will take up and dispose of what we consider to be the eleven most serious grounds. The other fourteen which we record below simply to indicate that they have not been overlooked, are found completely without merit and not warranting discussion here. Some border on the frivolous. These grounds are:

(1) Inflammatory prosecutorial remarks.
(2) Admission into evidence of pre-September 1959 Expenditures.
(3) Admission of testimony of investors not named in the indictment.
(4) Improper cross-examination of defendant Adler.
(5) Prejudicial response of government's investor witness.
(6) Improper hypothetical question posed by trial judge.
(7) Introduction of Exhibit 508.
(8) Length of trial prejudicial.
(9) Introduction of hearsay evidence.
(10) Variance between proof and indictment.
(11) Improper instruction with regard to the use of the mails.
(12) Denial of appellants' requested instruction in answer to jury's request for additional instruction.
(13) Refusal to give appellant Kroll's requested stock ownership instruction.
(14) Refusal to give appellants' requested instruction on reliance upon advice of counsel.

secured by mortgages, promissory notes, evidences of indebtedness, investment contracts and mortgage insurance bonds during the period from about January 20, 1958 to about December 31, 1961.

The facts of this case are multi-faceted and extremely complicated. Because of the nature of the challenges raised here and discussed *infra* it is not necessary that we recount in detail the lengthy and involved scheme alleged. Succinctly stated, it was alleged that the defendants engaged in an intensive campaign whereby risky and virtually worthless mortgages were purchased from sources affiliated with ABM, a company established to deal in mortgages, were represented to be fully insured as to interest and principal by what in fact was a financially unsound ABM-affiliated insurance company, and were sold to the public by means of false and misleading advertisements and other false statements made to investors. In December, 1961, ABM was petitioned into bankruptcy along with its affiliated companies after allegedly defrauding investors of millions of dollars.

We proceed to discuss in some detail the points raised which we consider worthy of discussion.

## I.

## SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION

Each of the defendants except Cahn asserts that there was insufficient evidence in the record to support his conviction, and that it was error for the court to deny

the respective motions for judgments of acquittal. On a motion for judgment of acquittal the test is whether, in the view most favorable to the government, a reasonably-minded jury might accept the relevant evidence as adequate to support a conclusion of the defendants' guilt beyond a reasonable doubt. *Glasser v. United States,* (1942) 315 U.S. 60, 60, 62 S.Ct. 457, 86 L.Ed. 680; *Mortensen v. United States,* (1944) 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331; *Davis v. United States,* 5 Cir. 1967, 385 F.2d 919; *Lambert v. United States,* 5 Cir. 1958, 261 F.2d 799; *Vick v. United States,* 5 Cir. 1954, 216 F.2d 228, 232. These jury verdicts, then, must be permitted to stand if there is substantial evidence to support them, taking the view most favorable to the government, without weighing conflicting evidence or testing the credibility of the witnesses, and allowing in favor of the verdicts all reasonable inferences from the evidence.

The government introduced evidence tending to prove that the defendants developed a highly-organized sales campaign replete with half-truths, misrepresentations, and other deceptive techniques in order to interest investors in purchasing mortages. The salesmen were furnished with complete sales kits extolling the financial soundness of the program offered. The sickly financial condition of ABM was not disclosed to investors. Salesmen were instructed to tell prospective investors that the mortgages were on "preferred, selected, single-family Florida homes", when in truth many of the mortgages encumbered much less desirable properties. It was represented that the mortgages were insured by a policy which was authorized by the Florida Insurance Commissioner, when the Commissioner had not so approved the policy. Investors were told that investments in mortgages were 100% safe because the

mortgages were insured, when in fact the ABM-affiliated insurance company was inadequately financed to insure fully the risks presented. Relevant matters withheld from investors included: ABM's lack of mortgages in inventory, the poor quality and near worthlessness of mortgages assigned, the fact that mortgages were often on vacant land and hence uninsurable or illegally insured under Florida law, the fact that mortgages were junior to other liens of millions of dollars, and finally the fact that the insurance bonds were of little protection and were issued by an insurance firm affiliated with ABM. Evidence indicated that investors' funds were used to make interest payments to other investors because defaults on mortgages had reduced ABM's cash supply. Evidence also tended to show that the defendants had improperly diverted company funds for their own personal use, and for the purpose of financing other projects of interest to the defendants.

Defendants contend that they relied in good faith on the advice of counsel in operating this business. Significantly, however, the counsel upon whose advice they claim they relied was not called as a witness. In fact evidence was introduced by the government that house counsel had admonished the defendants that delivery of mortgages before houses were completed on the properties might be fraudulent, and that Florida law did not allow insurance of vacant lot mortgages. Outside counsel had also advised that apparent misrepresentations might be violations of the anti-fraud provisions of the securities laws. Letters from Aetna and Kemper insurance executives, who issued fidelity bonds to ABM, indicate their concern over misrepresentations made in ABM's advertising. Nevertheless the operation continued.

Although the numerous defendants were involved at different times and to differing degrees in the perpetration of this scheme, there was plentiful evidence at trial from which a jury could reasonably find beyond a reasonable doubt that all participated knowingly in the unlawful acts for which they were indicted. The defendants were free to introduce evidence of good faith reliance upon counsel as tending to prove they lacked criminal intent, but the jury was not bound to accept this evidence. The record contained other competent evidence from which the jury could find that the defendants in fact acted with the requisite intent to defraud.

## II.

## PRE-INDICTMENT DELAY

The indictment which was returned on February 15, 1966, alleged that the conspiracy terminated on December 31, 1961. The appellants contend that they were deprived of a fair and speedy trial by virtue of a delay of over four years measured from the date of termination of the scheme to the date of the return of the indictment.

The applicable statute of limitations in this case is five years. It is well-settled in this Circuit that the Sixth Amendment right to a speedy trial and the rights granted by F.R.Crim.P. 48(b) do not accrue to a defendant until after a prosecution is instituted. *Grayson v. United States*, 5 Cir. 1969, 416 F.2d 1073, 1076-77, cert. denied 396 U.S. 1059, ___ S.Ct. ____, ____ L.Ed.2d ____ (1970); *Harlow v. United States*, 5 Cir. 1962, 301 F.2d 361, cert. denied 371 U.S. 814, 83 S.Ct. 25, 9 L.Ed.2d 56 (1962). Any delay

between commission of the crime and indictment is controlled by the applicable statute of limitations. *Grayson v. U. S.*, supra; *Bruce v. United States*, 5 Cir. 1965, 351 F.2d 318, cert. denied 384 U.S. 921, 86 S.Ct. 1370, 16 L.Ed. 2d 441 (1966). The defendants urge that we adopt the reasoning of *United States v. Parrott*, 248 F.Supp. 196 (D.D.C. 1965), wherein an indictment was dismissed in part because the court found that the defendants had been unduly prejudiced by unexcused pre-indictment delay. Even if *Parrott* was the applicable law of this Circuit — which it is not — the case would not be applicable to the situation at hand, for the defendants have not sufficiently demonstrated any prejudice stemming from the lapse of time prior to indictment.

## III.

## GRAND JURY ARRAY

The defendants allege that the grand jury selection process in the Southern District of Florida is discriminatory and does not represent a fair cross-section of the community. This contention was specifically rejected in *Stassi v. United States*, 5 Cir. 1968, 401 F.2d 259.

## IV.

## CAHN'S MOTION FOR CONTINUANCE

Defendant Cahn argues that the trial court abused its discretion in denying his motion for a continuance so that counsel might have additional time to prepare for trial. After the indictment was filed Cahn was initially

represented by an attorney who filed various pre-trial motions and participated in pre-trial proceedings. Four weeks prior to trial, this attorney was allowed to withdraw from the case with respect to representation of Cahn. Cahn took sixteen days thereafter to retain new trial counsel. Twelve days prior to trial new counsel made an oral motion for continuance. The court denied it immediately.

Apart from calling attention to the shortness of time for preparation, Cahn has not demonstrated that trial counsel was prevented from properly defending him or that he was otherwise prejudiced by being required to go to trial. In fact, the record shows that trial counsel vigorously participated in the trial and demonstrated a full range of trial talents and knowledge of the case. We find no abuse of discretion by the trial judge, and no prejudice flowing to the defendant Cahn from the denial of the continuance.

## V.

## SEVERANCE

Defendant Kroll claims that Cahn and Criswell had testified in a prior bankruptcy hearing that Kroll did not dominate ABM as the indictment alleged. Kroll here alleges that if a severance had been granted Cahn and Croswell would have repeated their testimony exculpating Kroll, and that the joint trial deprived him of the opportunity to call the two men as his own witnesses. However, when Cahn and Criswell took the stand in their own behalf they made statements tending to exculpate Kroll. The jury

was free to accept this testimony. Kroll has not demonstrated an abuse of discretion by the trial court in this respect. *Smith v. United States*, 5 Cir. 1967, 385 F.2d 34.

With regard to the other defendants, we likewise find no prejudice from the denial of severance. Each defendant was named in each count of the indictment, and there was thus no danger that the jury would be confused or misled into considering evidence in the case of a defendant to which it did not apply. The defendants' reliance on *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) is of course entirely misplaced. Here no confessions or out-of-court inculpatory statements by any defendants were introduced, and all of the defendants did take the stand and were fully available to each other defendant for cross-examination.

When possible without prejudice to the rights of defendants joint trial aids in the efficient administration of justice. Particularly is this so when, as here, severance would require the expense of several long trials involving substantially the same evidence. The various arguments that some of the defendants played larger roles than others in the alleged conspiracy, or that some of the defendants had allegedly "antagonizing personalities" which a jury might not like, or that the impeachment of one of the defendants might "rub off" on the other defendants, taken singly or together, do not present grounds for separate trials. The trial court fairly and fully admonished the jury during his complete and detailed instructions to consider the guilt or innocence of each defendant only upon the evidence introduced against him and to determine its verdicts separately as to each defendant under each count of the indictment.

## VI.

## READING OF THE INDICTMENT

Appellant Hunt urges that it was error for the trial judge to read the indictment to the jury. The trial judge's instructions informed the jury that the indictment was not evidence, that it did not raise a suspicion of guilt, and that it was merely the method by which persons are charged and brought to trial. There was no error. *United States v. Press*, 2 Cir. 1964, 336 F.2d 1003, cert. denied 379 U.S. 965; *United States v. Martin*, 2 Cir. 1955, 223 F.2d 666, 667; *Blauner v. United States*, 5 Cir. 1961, 293 F.2d 723, 736; *Laughlin v. United States*, D.C. Cir. 1967, 386 U.S. 287, 295; cert. denied 390 U.S. 1003; *United States v. Hoffa*, 7 Cir. 1966, 367 F.2d 698, 713, vacated on other grounds, 387 U.S. 231. See further *Williams v. Beto*, 5 Cir. 1966, 354 F.2d 687, and cases there cited.

## VII.

## SEARCH QUESTION

We deal here with one of the more difficult issues of the case. Cahn complains that his motion to suppress the search of the books of an affiliated company of ABM, as well as the fruits of such search, was erroneously denied because the evidence was obtained through an unlawful search. Cahn was the sole stockholder and president of the company. When the company was petitioned into bankruptcy, the referee in bankruptcy ordered the trustee to take possession of and remove the records from the premises of the company. The appellants did not object to the taking of possession by the trustee. One and a half

years later, an accountant for the Securities and Exchange Commission requested permission from the trustee to examine the books. Permission was granted. The accountant remained on the scene for two years and evidence gathered as a result of the examination was presented to the grand jury and at trial. The two principal issues raised are (1) Cahn's standing to object to the search, and (2) the authority of the trustee to consent to the search.

Our discussion begins with *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Jones was the occasional guest of the owner of an apartment. The owner had given Jones the key. The police searched the apartment while Jones was present, and seized narcotics which they found in a bird's nest in an awning outside the window. The Supreme Court held that Jones had standing to contest the search, noting that the search was directed at Jones because his privacy had been invaded. Mr. Justice Frankfurter, writing for the Court, said:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else". 363 U.S. at 261.

*Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 1154, 20 L.Ed.2d 2120 (1967), further considered the issue of standing. This case dealt with the seizure of labor union documents from an office shared by the objector and several other union officials. It was held that the official

had the requisite standing to object to the search because it was a "private office" in which DeForte could reasonably expect that only union officials or their personal or business guests would enter.

In *Mancusi* the Supreme Court pointed out that standing to object to a search or seizure belongs to one who has title to the premises searched, or to one who has a possessory interest in the premises, or to one legitimately on the premises where the search occurs. It was further there stated that *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), established that the right to claim the protection of the Fourth Amendment depends not only on a property right in the invaded place, but also upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.

In *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), the Supreme Court reaffirmed the vitality of *Jones:*

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppression of relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."
>
> * * * * *
>
> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or

> destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth". 394 U.S. 173-75.

Mr. Justice Fortas dissented in *Alderman*, urging:

> "The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial".

Although concededly the question is close we conclude that Cahn does not have standing to complain about the search. Once the corporation was in bankruptcy, Cahn no longer had any title in the corporate records, as title passed by operation of law to the trustee in bankruptcy. Title 11, U.S.C., Section 110; *Bisno v. United States*, 9 Cir. 1961, 299 F.2d 711. Neither did Cahn have any possessory interest in the corporate records. The records were examined on the premises of the trustee in bankruptcy, and no area in which Cahn had an interest was violated. Only corporate records, and not personal records of Cahn were examined. In this regard, see also *Elbel v. United States*, 10 Cir. 1966, 364 F.2d 127.

We think also that any "reasonable expectation" or agency argument proceeds on an erroneous concept of the role of a trustee in bankruptcy. The trustee is not the exclusive agent of the bankrupt, but rather is an officer

of the court and a representative of creditors as well. Title 11, U.S.C., Sections 74 and 110; *Ansbacher & Company v. Klebanow*, 2 Cir. 1966, 362 F.2d 569. A trustee is a person appointed by the court to manage the estate in the midst of the bankruptcy proceedings, to conserve the assets, and to put the business affairs of the bankrupt in sufficient order to facilitate the dissolution of the business and the distribution of assets to creditors and those holding equity interests. We think it significant that the trustee is under a duty to report to the United States Attorney any probable criminal violations of the bankruptcy act and to disclose to that official all relevant information. Title 11, U.S.C., Section 3057. In light of the strong governmental interest in protecting creditors in a bankruptcy situation a bankrupt would indeed be shortsighted if he did not perceive that many interested parties, governmental or otherwise, might be interested in examining the books of the bankrupt business. Reasonable expectations are that government officials will be examining the books.

*Henzel v. United States*, 5 Cir. 1961, 296 F.2d 650, is not inconsistent with the result reached here. A general levy had been made on the corporation of which Henzel was the sole shareholder and president. The corporate premises searched by the Postal authorities with permission of the sheriff were still maintained by Henzel as his daily working office, and it was clear that there was an improper invasion of an area in which he had a possessory interest at the time of the search. *United States v. Kanan*, 225 F.Supp. 711 (D.Ariz. 1963), involved a search made with the permission of a receiver appointed under Arizona law. Because of the limited powers of a receiver under state law that case may be dismissed as

not inconsistent with the result here reached, but even assuming that it is inconsistent, we choose not to adopt the *Kanan* reasoning. We also note with interest a recent article, "Standing to Object to Search and Seizure", 118 University of Pennsylvania Law Review 333 (January 1970), which details some of the problems and legal inconsistencies which pervade this area of the law. Although arguing for a broader rule on the issue of standing, the authors acknowledge that the Supreme Court cases discussed above establish the law as it is today. Perhaps the suggestions contained in the article, which would give Cahn stronger grounds to claim standing here, merit consideration by the Supreme Court in some future case or controversy. We are of the view that the law as it now stands will not support Cahn's claim of standing. In view of this conclusion, we pretermit discussion of the question raised as to the bankruptcy trustee's authority to consent to the search.

## VIII.

## SUMMARY CHARTS

All of the appellants object to the admission of summary charts reflecting the disposition of funds by ABM and its affiliates. The charts were prepared from records of those companies by Securities and Exchange Commission examiners. The underlying records were marked for identification but were never introduced into evidence. The appellants urge that summaries may not be admitted when the records upon which they are based have not been introduced into evidence.

The weight of authority stands for the proposition that summaries prepared by an expert accountant of

corporate records are admissible even though the records themselves are not admitted into evidence. Rather, it is required that the records must be available (ordinarily in court, unless too bulky and cumbersome) for the defendant's inspection. *Bruce v. United States*, supra; *McDaniel v. United States*, 5 Cir. 1965, 343 F.2d 785, cert. denied 382 U.S. 826; 4 Wigmore on Evidence, 3rd Ed., Section 1230.

## IX.

## PREJUDICIAL CLOSING ARGUMENT

Appellants Criswell and Hunt contend that it was error for the prosecutor to allude in his rebuttal closing argument to the failure of the appellants to call any investors to the stand. One of the defenses relied on by the appellants was that they had a good faith belief in the success of the company and tried to protect investors' funds, but the appellants presented no investor witnesses to testify that they had been dealt with fairly by the appellants. The prosecutor called this failure to the attention of the jury.

*Smith v. United States*, 5 Cir. 1956, 234 F.2d 385, states:

> ". . . the rule against commenting on the failure of a defendant to testify in his own behalf 'does not go to the extent of forbidding argument by counsel for the prosecution to the effect that the evidence against a defendant is uncontradicted'. The same is true with respect to a failure to produce testimony on any phase of the defense upon which the accused seeks to rely".

The prosecutor's comment was well within established limits of propriety.

## X.

## INSTRUCTIONS AS TO GOOD FAITH DEFENSE

The appellants Cahn and Kroll urge that the trial judge erred in refusing to give their proposed instructions on good faith. The appellee concedes that the defendants were entitled to have their defense of good faith squarely presented to the jury, but contends that the jury was fairly informed by the general instruction of the reliance on good faith as a defense. The appellee further asserts that the appellants failed to object to the charge given by the court, and that therefore here reversal can only be predicated on "plain error" which they argue was not committed. See Rules 30 and 52(b), F.R.Crim.P. We agree with the government's position as to both points.

Even though a proposed charge is a proper statement of the law and the evidence warrants such a charge, a defendant is not necessarily entitled to have the charge presented to the jury in the exact words proposed so long as the substance of the proposition is fully and fairly conveyed to the jury. The charge ultimately given by the court was disclosed to counsel during a protracted charge conference the day before counsel argued the case to the jury. We set it out in the margin.[3] The appellants contend that the words "any false representations by a defendant" led

[3]The portion of the charge in dispute was given as follows:
"As to counts 1 through 8, 11, 13, and 14 of the indictment, any false representations made by a defendant must have been known by him to be false. A good faith belief in the truth of statements made is a complete defense to the charges of fraudulent misrepresentations." (R. 4110-11).

the jury to conclude that the good faith defense only applied to statements made by the defendants and not to actions of the defendants. They say that this was error of prejudicial proportions requiring reversal of their convictions.

Not so, in our judgment. The trial judge in his instructions fully covered the elements of each offense charged and the meaning of the words "knowingly", "willingly" and "intent to defraud". Moreover, each of the defendants took the stand and made it clear that he relied on his good faith as a defense, categorically denying *malam fides* or intent to defraud. The government maintains — and we think with justice — that in the overall context of the trial and the charges the jury was fairly presented with the good faith defense. See *New England Enterprises, Inc. v. United States*, 1 Cir. 1968, 400 F.2d 58, cert. denied 393 U.S. 1036; *Beck v. United States*, 10 Cir. 1962, 305 F.2d 595. Perhaps the trial judge might have chosen words which would have more precisely conveyed that acts as well as words are included within a defense of good faith, but in a comprehensive view of this long trial (the record encompasses 4200 pages) the slight difference in nuance or accent pointed out is minimal import. The defense was before the jury.

Further and of critical significance, we find the record bare of any objection by counsel for Cahn and Kroll to the charge as finally given by the trial judge. Before the jury began its deliberations, full opportunity to object (as contemplated by Rule 30, F.R.Crim.P.) was given, but no objection was voiced as to this phase of the instructions. Cahn's requested instruction No. 9 included a charge on good faith which covered acts as well as state-

ments. Although a colloquy occurred during the charge conference between the trial judge and counsel for appellants Hunt and Adler over the wording of the good faith instruction which the judge proposed to give, (R. 4001-4010), and finally gave, we find no indication that counsel for Cahn and Kroll joined in that discussion or made any objections to the court's proposed good faith instruction. Counsel was told that the court would "think about" amending its own instruction covering good faith as a defense.

The following morning, just prior to the start of argument to the jury, the court went over with counsel several other matters reserved from the charge conference. Good faith as a defense was not again alluded to. No one pointed out to the court that this question had been reserved for further consideration. (R. 4056-4060) This failure to object occurred immediately following an explicit admonition from court to counsel that: "Between now and the time that the jury is retired you are going to have to comply with the rules and specifically state the specific instruction to which you are objecting". (R. 4055).

After completing his instructions to the jury, the court again gave counsel the opportunity to object to the charges contemplated by Rule 30, F.R.Crim.P. (R. 4127-37). The court specifically noted that each and every defendant had been given the benefit of an objection to those instructions which had been proposed and refused by the court during the charge conference, but was explicit in stating that specific objections were required to any charges given by the court and found objectionable. (R. 4128-29). The court further noted that while every defendant was allowed an objection as to those charges which

he individually had requested and been refused, no party was given the benefit in the record of objections made by any other defendant. (R. 4130-31). The court restated its position by commenting that the requests to charge had not been made jointly, and would not be so considered for purposes of objections. (R. 4131). In the face of these repeated and rather laborious invitations to object and secure rulings, neither Cahn nor Kroll objected to the instructions as to good faith as a defense.

We have taken pains to relate these matters at some length in order to demonstrate the basis for our holdings: (1) that the point was not preserved for review by Cahn and Kroll, and (2) that we are not here justified in applying the "plain error" rule. Rule 52(b), F.R.Crim.P.

## XI.

## SENTENCE CORRECTION

Kroll argues that he was subjected to an illegal sentence when the trial judge originally ordered five year concurrent sentences, and moments later changed the sentences so that two of the five year sentences would run consecutively. No error was committed. See *Bozza v. United States*, 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947); *Williams v. United States*, 5 Cir. 1970, 422 F.2d 1318; *Vincent v. United States*, 8 Cir. 1964, 337 F.2d 891, cert. denied 380 U.S. 988.

We have carefully considered the record and briefs with respect to the claims of each appellant. Error in the trial and conviction is not demonstrated as to any appellant. The judgment appealed from is

AFFIRMED.

## APPENDIX C

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

No.

FRED H. ADLER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## APPLICATION FOR EXTENSION OF TIME PURSUANT TO RULE 22

COMES NOW the petitioner, FRED H. ADLER, by and through his undersigned counsel, and files this his application for an extension of time pursuant to Rule 22 of the Rules of the Supreme Court of the United States and as grounds therefor would show unto the Court as follows:

1. This cause originated in the United States District Court, Southern District of Florida.

The petitioner, together with seven other individuals, was charged in a Fifteen Count indictment, charging fraud in the sale of securities, 15 U.S.C. § 77q(a), Count One-Seven; mail fraud, 18 U.S.C. § 1341, Counts Eight-Fourteen and conspiracy as to each of said Statutes, 18 U.S.C. § 371, Count Fifteen. Pre-trial motions, which motions challenging the array of both the Grand Jury and

the Petit Jury, were denied after a full hearing thereon. The cause came on for trial on November 14, 1966, and on December 23, 1966, the jury impaneled to hear the cause found the petitioner, FRED H. ADLER, guilty as to Counts One, Two, Three, Four, Five, Six, Seven, Eight, Eleven, Thirteen, Fourteen and Fifteen as charged in the indictment.

In the presentation of the Government's case, the Government offered the testimony of 69 witnesses and placed into evidence numerous exhibits.

From the denial of the motion for directed verdict at the close of the Government's case, from a reservation of ruling on the motion for judgment of acquittal at the close of all the evidence and from a denial of the renewed motion for judgment of acquittal and from the judgment of guilt as to petitioner and others and sentence of the Court, an appeal was prosecuted to the United States Court of Appeals for the Fifth Circuit under case number 24583.

2. That on November 2, 1970, the Court having heard argument of counsel, affirmed the above and foregoing judgment of guilt of the said petitioner, said opinion being attached hereto and made a part hereof as petitioner's Exhibit 1.

3. That in its opinion, the Court of Appeals in passing upon the failure of the Government to place into evidence numerous exhibits upon which were based summaries which were offered into evidence over the strenuous objection of petitioner's counsel, the Court of Appeals made the following ruling:

"The weight of authority stands for the proposition that summaries prepared by an expert accountant of corporate records are admissible even though the records themselves are not admitted into evidence. Rather, it is required that the records must be available (ordinarily in court, unless too bulky and cumbersome) for the defendant's inspection. *Bruce v. United States*, supra; *McDaniel v. United States*, 5 Cir. 1965, 343 F.2d 785, cert. denied 382 U.S. 826; 4 Wigmore on Evidence, 3rd Ed., Section 1230."

4. That it is respectfully submitted that this ruling constituted a deprivation of due process of law but, moreover, is in direct conflict with the rulings of not only their own Circuit, but of other circuits and of this Court in allowing into evidence summaries which are not based upon exhibits which are in fact in evidence and *available to the jury* for comparison purposes, said cases which are relied on being as follows:

*U.S. v. Pepe*, 3rd Circ., 36 F.2d 1015, 1017
*U.S. v. Michener*, 3rd Circ., 152 F.2d 880
*U.S. v. Ward*, 3rd Circ., 169 F.2d 460
*Bernstein v. U.S.*, 5th Circ., 234 F.2d 475
*Felmister v. U.S.*, 5th Circ., 260 F.2d 513
*U.S. v. Willis*, 322 F.2d 552
*Myers v. U.S.*, 5th Circ., 356 F.2d 469
*Azcona v. U.S.*, 5th Circ., 257 F.2d 462
*Bruce v. U.S.*, 5th Circ., 351 F.2d 318
*Cooper v. U.S.*, 5th Circ., 91 F.2d 195
*Gradsky v. U.S.*, 5th Circ., 342 F.2d 147
*Greenhill v. U.S.*, 5th Circ., 298 F.2d 405
*Holland v. U.S.*, 348 U.S. 121, 75 Sup.Ct. 127

*Kolbrenner v. U.S.*, 5th Circ., 11 F.2d 754
*McDaniel v. U.S.*, 5th Circ., 343 F.2d 785
*Rotolo v. U.S.*, 5th Circ., 404 F.2d 316
*Steele v. U.S.*, 5th Circ., 222 F.2d 628
*Ward v. U.S.*, 5th Circ., 356 F.2d 938

5. That the petitioner herein did not seek to delay the effect of the opinion of the Court of Appeals by a petition for rehearing with regard to this point, it being felt that ample presentation had been made on the point clearly presented.

6. That in the brief period that has elapsed, petitioner herein having been declared to be in forma pauperis by the United States District Court for the Southern District of Florida, counsel had endeavored to receive authority and has now received authority for the purpose of prosecuting certiorari to this Court on the point alluded to above, but that such authority was not secured until immediately preceding the presentation and filing of this application for extension, the petitioner being a resident of the State of Ohio and counsel being a resident and practitioner of the State of Florida, creating difficulties with regard to the opportunity to confer and communicate regarding said matter.

7. That this application for extension is sought for the purpose of presenting in good faith said petition and not for the purpose of delay and can in no wise prejudice the respondent herein, almost four years having thus elapsed since the conviction in this cause in December, 1966.

WHEREFORE, your petitioner prays this Honorable Court pursuant to Rule 22 for an order extending the time for the filing of the petition for writ of certiorari to the opinion of the Court of Appeals for the Fifth Circuit in the case of *Fred H. Adler v. United States of America*, case number 24583, said extension being requested for the full period of thirty (30) days.

Respectfully submitted,

EUGENE P. SPELLMAN
Attorney for petitioner

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I HEREBY CERTIFY that a copy of the above and foregoing was mailed air mail special delivery to the County Solicitor, Department of Justice, Washington, D.C. 20530, this 1st day of December, 1970.

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## APPENDIX D

SUPREME COURT OF THE UNITED STATES

**No.** .....

**October Term, 1970**

FRED H. ADLER,

*Petitioner,*

*vs.*

UNITED STATES

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## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 1, 1971.

s/ Hugo L. Black

Associate Justice of the Supreme Court of the United States

Dated this 7th day of December, 1970.

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## APPENDIX E

UNITED STATES COURT OF APPEALS
For The Fifth Circuit.

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**No. 24583**

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FRED H. ADLER,

*Appellant,*

*versus*

UNITED STATES OF AMERICA,

*Appellee.*

---

**Appeal from the United States District Court for the Southern District of Florida**

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ORDER:—

IT IS ORDERED that the motion of appellant, Fred H. Adler, for a petition for stay of the mandate to and including January 1, 1971, pending his petition for writ of certiorari to the Supreme Court of the United States, filed in the above styled and numbered cause, is hereby GRANTED.

/s/ BRYAN SIMPSON
United States Circuit Judge

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## APPENDIX F

[2704] Q Now, sir, during the course of your examination of these various companies did you have an opportunity to make an analysis of American Bonded Mortgage Company's cash receipts and disbursements?

A Yes, sir, I did.

Q Have you, sir, prepared for your testimony here today a chart which will enable you to more fully explain your analysis of the cash receipts and disbursements of the American Bonded Mortgage Company?

A Yes, sir.

Q Is this, sir, the chart that you prepared (indicating)?

[2705] A Yes, sir, it is.

MR. OSMAN:

Mr. Clerk, would you please mark this as the next Government Exhibit for Identification.

THE CLERK:

Yes, sir.

BY MR. OSMAN:

Q Now, sir, the information that you obtained—the information that is contained on the (2782) chart that you have prepared and which you have just identified, and which is now being marked by the Clerk as Government's Exhibit 497 for identification—

THE CLERK:

Government's Exhibit 497 for identification.

(Thereupon the document referred to was marked as Government's Exhibit No. 497 for identification.)

BY MR. OSMAN:

Q Where did you obtain the information that is on that chart?

A From the books and records of American Bonded Mortgage Company.

MR. OSMAN:

At this time, your Honor, the Government moves to [2706] introduce in evidence the next Government's exhibit, 497.

MR. SPELLMAN:

May I ask a question, your Honor?

THE COURT:

Yes, sir.

MR. SPELLMAN:

Mr. Callahan, you have been here throughout the entire trial, have you not?

THE WITNESS:

Yes, sir.

(2783) MR. SPELLMAN:

You are familiar with what books and records have been placed into evidence as far as the various corporations are concerned?

THE WITNESS:

Yes, sir.

MR. SPELLMAN:

Are all of the books of American Bonded Mortgage Company, on which you have based your chart—have they been placed in evidence?

THE WITNESS:

They have not all been placed into evidence. One or two of them have been put into evidence, I believe, but the majority of them have been identified.

[2707] MR. SPELLMAN:

And they are here in this courtroom but not in evidence?

THE WITNESS:

That's right.

MR. SPELLMAN:

If the Court please, on that basis we would object to the Government offering into evidence any exhibits that purport to be based upon any books and records which are not in evidence and cannot be checked by the jury in their consideration of these exhibits after they retire to deliberate their verdict.

MR. PREBISH:

Your Honor, before you rule may I ask a question?

(2784) THE COURT:

Yes, sir.

MR. PREBISH:

In just taking a quick look at the identified exhibit there I observe a certain number of lines of figures.

Am I to understand, sir, that all of the figures that are noted on the proposed exhibit are actual figures that have been taken from the record, or are some of the figures based upon conclusions and inferences and opinions that you have drawn from the examination of those records?

[2708] THE WITNESS:

Well, this particular exhibit here—it all relates to cash transactions.

MR. PREBISH:

The question is this: Is each particular item that is noted therein with a particular figure—is that particular figure reflected in all the records and books which you examined or are some of the figures conclusions drawn or inferences drawn?

THE WITNESS:

Well, the figures in this particular chart—when you say "opinons," and "conclusions,"—as you ordinarily

think of an accountant's opinion and conclusion—I would say that there are none on this chart.

(2785) Now, in the preparation of this chart we did, of course, have to group certain accounts together; and beyond that, I would say that there are no opinions in there other than a few minor reclassification entries and things of that nature.

MR. PREBISH:

Then there are computations in there which were not taken from the records?

THE WITNESS:

Every figure reflected in these charts—it came from the records in one form or another.

[2709] MR. PREBISH:

Well, I want to know if they precisely came from the numerical figures in the books and records.

THE WITNESS:

Yes, sir.

MR. PREBISH:

And, further, those figures, however, are not based upon the records which are in evidence at this time; is that correct?

THE WITNESS:

They are based upon—

MR. PREBISH:

The question is: They are not based upon the records which are in evidence at this time?

MR. OSMAN:

I object, your Honor. It (2786) is repetitious. It has already been answered.

MR. PREBISH:

I want to make sure.

MR. OSMAN:

If he didn't hear it, that's his business.

THE COURT:

He has already answered the question. I will let him answer it again.

[2710] THE WITNESS:

This chart was prepared from records, some of which are in evidence and some of which have been identified but are not in evidence.

MR. PREBISH:

The bulk of the figures are from records which are in evidence or not in evidence?

THE WITNESS:

Well, at this point I really can't recall just what records have been put into evidence and which have not.

I would—if I had to answer the question, I would say that the bulk of the figures are from records which are not in evidence.

## APPENDIX G

[2713] THE COURT:

All right, sir. Other than those objections and the ones which have been agreed to which affect the materiality and relevancy, are there any additional objections?

All right, the objections are overruled and the document is admitted in evidence as Government Exhibit No. 497.

(Thereupon the document was marked as Government's Exhibit No. 497 for Identification.)

## APPENDIX H

[2722] Q Now, sir, were you also able to ascertain from your examination of the books and records what the total amount of cash on hand was for the American Bonded Mortgage Company, Aspic Investments Corporation and Flora Sun Corporation as of that date—July 31, 1961?

MR. WARREN:

If your Honor please, I (2798) object to that question. As I understood this chart, it relates only to American Bonded Mortgage Company. This question encompasses two other corporations. I don't think it is proper, particularly at this point.

MR. OSMAN:

He testified he made an examination of the books and records of all of these corporations.

THE COURT:

Well, I don't think the question relates to the chart.

MR. OSMAN:

No, it doesn't.

[2723] THE COURT:

I think he is asking him an independent question based upon his examination of the books, which has no bearing on the chart at all. If it did, I assume the chart would show it.

I will overrule the objection.

MR. SPELLMAN:

I assume we have an individual and continuing objection in that we have objected to the fact that he is testifying, outside of the chart which is in evidence, regarding any independent testimony pertaining to books and records which are not in evidence and which will not be in a position to be considered by the jury at the time they deliberate on their verdict to ascertain the accuracy (2799) of any of the expert testimony.

THE COURT:

Yes, sir. You may have a continuing objection. And I have overruled it upon the basis that this man is qualified as a C.P.A. He testified that he had examined the books and records; he prepared a report on it, and he is testifying on the basis of his examination from the books and records.

MR. OSMAN:

I would like the record to reflect that the books and records that Mr. Callahan has used for his [2724] testimony are available to defense counsel for their cross examination to show this jury, if they can, any discrepancy between his testimony and what is in those books.

MR. SPELLMAN:

If your Honor please, I ask that the jury be excused at this time.

THE COURT:

All right, sir. Do you want to move for a mistrial?

MR. SPELLMAN:

Yes, sir.

THE COURT:

The motion is denied. Let's go.

# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1191

FRED H. ADLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals is reported at 433 F. 2d 1282.

### JURISDICTION

The judgment of the court of appeals was entered on November 2, 1970. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to January 1, 1971, and on January 2, 1971, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether an accountant's summaries of corporate records were properly introduced into evidence.



416-648—71

## STATEMENT

After a lengthy jury trial in the United States District Court for the Southern District of Florida, petitioner and others were convicted of one count of conspiracy to violate 15 U.S.C. 77q(a) and 18 U.S.C. 1341, seven counts of fraud in the sale of securities in violation of 15 U.S.C. 77q(a), and four counts of mail fraud in violation of 18 U.S.C. 1341. Petitioner was sentenced to six months' imprisonment on one count and three-years' probation on each remaining count, these sentences to run concurrently (R. 4208). His conviction was affirmed by the court of appeals.

The evidence at trial showed that mortgages and mortgage notes were offered for sale pursuant to a promotional campaign involving false and misleading advertising as well as other omissions and untrue statements of material facts (R. 432–434, 484–485, 715–721, 1207, 1506–1515, 1612–1613, 1715, 1900, 1977, 2043–2045, 2518, 3430). These securities were issued and sold by American Bonding Mortgage Co., Inc. (ABM), the hub of a complex of numerous corporations so interlocked that they in fact operated as one business.[1] Although ABM was insolvent from inception, it nevertheless accepted, during the approximately four years of its operation, over $9,000,000 from investors (R. 2719, 2867). The funds so obtained were used to finance large advertising, travel, entertainment

[1] While the interrelated nature of ABM and its affiliates can be fully understood from an examination of the entire trial record (R.), the following references provide an adequate indication of the nature of the complex: R. 427, 915–919, 2146, 2773–2776, 2819–2823, 3176–3178, 3275–3276, 3753, 3759.

and promotion expenses, the development and purchase of real estate, payment of interest to investors for whom mortgages had not yet been secured, purchase of mortgages of questionable value, and numerous personal expenses (R. 817, 920, 927–928, 938–939, 1238, 1242, 2004–2005, 2365–2368, 2728, 2736, 2740, 2748, 2794–2795, 2826–2841, 2852, 2856–2860, 3183, 3629).

Among the misrepresentations employed to defraud investors were the following:

(a) That the mortgage investments were completely safe, when in fact ABM and its affiliates were insolvent from the time they commenced doing business (R. 1207, 2866);

(b) That the mortages were insured as required by Florida law, while in actuality a vast portion of the delivered mortgages were upon vacant, unimproved land—contrary to representations that they were on owner-occupied land (R. 1575, 2503)—and as such were not insurable under the applicable Florida statutes (R. 1016–1018, 1140–1144, 1393–1395, 1409, 1612–1613, 1715, 1900, 2055, 2078, 2381–2382, 2399, 2419, 2518);

(c) That investors would receive first or second mortgages on improved property, when, in many instances, they actually received third mortgages or no mortgage at all (R. 1467–1469, 1685, 1977, 2059, 2064, 2133, 2410, 2470–2473, 2514, 2523–2525); and

(d) That the companies issuing the mortgages were independent of the companies insuring the mortgages, when in fact these various companies were all ABM

affiliates; that the insuring companies were financially sound, when they were actually insolvent and had no reserves with which to indemnify losses (R. 1012, 1604, 1611–1612, 2201–2209, 2216, 2219, 2243–2344, 2620, 2623, 2641).

During the course of the trial, government exhibits summarizing the disposition of funds by ABM and its affiliates were introduced into evidence over the objection of defense counsel (R. 2707, 2723). These summaries were prepared by the government's witness, George M. Callahan, a Certified Public Accountant and an experienced staff member of the Securities and Exchange Commission (R. 2700–2701), after an extensive investigation of ABM's corporate records. The corporate records were not introduced into evidence but were identified at trial and were available to the defense for purposes of cross-examination (R. 628–629, 2706–2707, 2711, 2724).

## ARGUMENT

Although not questioning either the qualifications of the government's accountant witness (Callahan) or the accuracy of his summaries, petitioner argues that it was error for the trial court to admit into evidence charts and records he prepared to summarize his investigation of corporate books and records, since the records themselves were not put in evidence. The contention confuses two well-established principles of law.

On the one hand, it is the general rule that summaries supported by primary evidence in the record may be introduced to aid the jury in comprehending

a complex fact situation, so long as the summaries offer a fair representation of the evidence already before the jury, *United States* v. *Johnson,* 319 U.S. 503; *Conford* v. *United States,* 336 F. 2d 285 (C.A. 10).[2] There is no requirement that such summaries have their basis in expert testimony or technical matters, such as a firm's accounts.

On the other hand, the law also recognizes that if the possible evidence in a case encompasses such a tremendous volume of technical records that jury examination of those records would be a practical impossibility, an expert's summaries of the entries in these books and records are admissible as evidence without admitting the primary sources. *Stevens* v. *United States,* 206 F. 2d 64 (C.A. 6); *Greenhill* v. *United States,* 298 F. 2d 405 (C.A. 5), certiorari denied, 371 U.S. 830, 372 U.S. 968; *United States* v. *Willis,* 322 F. 2d 548, 551 (C.A. 3); *Gradsky* v. *United States,* 342 F. 2d 147, 152 (C.A. 5), vacated on other grounds, 383 U.S. 265; 4 Wigmore, *Evidence* (3d ed.), Sec. 1230. In such a case, the summarizer's qualifications must be established, the original documents must be available to the adverse party at the hearing, and the person who prepared the summaries must be present for cross-examination, *Greenhill, supra.*

[2] In the trial of this case, a *Johnson* question was raised and the court sustained an objection to the government's introduction of summaries of certain documents already in evidence on the ground that this would be an invasion of the jury's province, since the jury could adequately evaluate the documents without assistance (R. 2742–2744).

These requirements were fulfilled in this case. The trial court found that the corporate records were so extensive that it would not be feasible for the jury to examine their entire contents (R. 2902–2904). The records were marked for identification and were available at trial for inspection by defense counsel. And the witness Callahan, qualified as an expert and the compiler of the summaries, was available for cross-examination.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971